93-974

No. 93-

Supreme Court, U.S.
FILED
DEC 20 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Petitioners,

v.

NAVCO and WILLIAM L. CALDWELL, III,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

RUSSELL N. LUPLOW
DAVID SAWYER
DAVID MACHNACKI
LAW OFFICES OF
RUSSELL N. LUPLOW
33 Bloomfield Hills Parkway
Suite 145
Bloomfield Hills, MI 48304

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
JAMES P. CONDON
9377 West Higgins Road
Rosemont, IL 60018-4938
(708) 518-9800
Attorneys for Petitioners Central States, Southeast and Southwest Areas Pension Fund, et al.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60

QUESTIONS PRESENTED

ERISA creates a cause of action for a pension plan against an employer that withdraws (ceases contributions) from the plan and fails to pay its statutory withdrawal liability. Each member of a group of trades or businesses under common control with the former contributor is jointly and severally liable. For purposes of the statute of limitations under the federal discovery rule, the court below held that a cause of action accrues against *all* such trades or businesses when *one* of them fails to pay its liability when demanded even though other liable trades or businesses are concealed from the pension plan. The questions presented are—

1. Whether for a cause of action under ERISA to accrue on a claim against a trade or business as a result of its failure to pay withdrawal liability, where that trade or business was concealed, a pension plan must have knowledge of the existence of the trade or business?

2. Whether dismissal of a cause of action under Fed. R. Civ. P. 12(b)(6) due to a statute of limitations bar may be affirmed on grounds of lack of diligence where the complaint alleges concealment of the identity of the defendants and plaintiffs are denied an opportunity to present evidence of diligence in support of equitable relief?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	10
I. INTRODUCTION AND SUMMARY	10
II. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS ON WHEN A CAUSE OF ACTION ACCRUES UNDER *KUBRICK*	15
A. Accrual Of This Withdrawal Liability Action Requires Knowledge Of The Actionable Controlled Group Relationship	15
B. Certiorari Is Warranted Here Because The Seventh Circuit's Decision Undermines Significant ERISA Policies	19
1. The conflict with *Sandoz Masonry's* policy discussion	19
2. The *NAVCO* court made 28 U.S.C. § 1451 (f) (2) superfluous	22
III. THE COURT BELOW EMPLOYED THE WRONG STANDARD OF REVIEW: IT HELD PETITIONERS ACCOUNTABLE FOR FAILING TO MAKE A RECORD OF DILIGENCE FOR SUMMARY JUDGMENT WHEN IN FACT THE DISTRICT COURT RULED WITHOUT A RECORD ON RESPONDENTS' MOTION TO DISMISS	24
CONCLUSION	28

TABLE OF AUTHORITIES

CASES Page

Barrett v. United States, 689 F.2d 324 (2d Cir. 1982), *cert. denied*, 462 U.S. 1131 (1984) 12, 16, 17, 18, 19, 24
Baskin v. Hawley, 807 F.2d 1120 (2nd Cir. 1986) .. 18
Central States Pension Fund v. NAVCO, 3 F.2d 171 (7th Cir. 1993) ..... *passim*
Central States Pension Fund v. Slotky, 956 F.2d 1369 (7th Cir. 1992) 11, 16
Concrete Pipe and Products v. Construction Laborers Pension Trust, —— U.S. ——, 113 S.Ct. 2264 (1993) 5, 6
Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C. Cir. 1991) 26
Diminnie v. United States, 728 F.2d 301 (6th Cir.), *cert. denied*, 469 U.S. 842 (1984) 12, 15, 18, 19
Dubose v. Kansas City S. Ry. Co., 729 F.2d 1026 (5th Cir.), *cert. denied*, 469 U.S. 854 (1984) 14, 19
Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1977) 18
Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959) 19, 26
Harrison v. United States, 708 F.2d 1023 (5th Cir. 1983) 18, 19
Hishon v. King & Spalding, 467 U.S. 69 (1984) 25
IUE AFL-CIO Pension Fund v. Barker & Williamson, 788 F.2d 118 (3rd Cir. 1986) 11, 16, 21
Joyce v. Clyde Sandoz Masonry, 871 F.2d 1119 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989) 19, 20, 21, 27
Northern California Retail Clerks Pension Fund v. Jumbo Markets, Inc., 906 F.2d 1371 (9th Cir. 1990) 18, 19
Pension Benefit Guaranty Corp. v. Ouimet Corp., 630 F.2d 4 (1st Cir. 1980) 10
Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 6
Richards v. Mileski, 662 F.2d 65 (D.C. Cir. 1981) .. 25, 26
Robertson v. Seidman & Seidman, 609 F.2d 583 (2nd Cir. 1979) 26

TABLE OF AUTHORITIES—Continued

	Page
Smith v. Nixon, 606 F.2d 1183 (D.C. Cir. 1979)	23
United States v. Kubrick, 444 U.S. 111 (1979)	*passim*
Williams v. Hartje, 827 F.2d 1203 (8th Cir. 1987)	26

STATUTES

28 U.S.C. § 1254(1)	2
29 U.S.C. § 1001a	22
29 U.S.C. § 1002(2)	5
29 U.S.C. § 1002(16) (B)	5
29 U.S.C. § 1002(35)	5
29 U.S.C. § 1002(37)	5
29 U.S.C. § 1104(a) (1) (A) (ii)	22, 23
29 U.S.C. § 1301	2
29 U.S.C. § 1301(a) (3)	5
29 U.S.C. § 1301(a) (10)	5
29 U.S.C. § 1301(b) (1)	6
29 U.S.C. § 1381	2, 5, 10
29 U.S.C. § 1399	3
29 U.S.C. § 1399(a)	7, 11, 13, 22, 23, 24
29 U.S.C. § 1399(b) (1)	5, 20, 21
29 U.S.C. § 1451(f) (1)	8, 12, 22, 23
29 U.S.C. § 1451(f) (2)	22, 23, 24
29 U.S.C. § 1451(f)	4, 7

OTHER AUTHORITIES

Fed. R. Civ. P. 12(b) (6)	*passim*
Fed. R. Civ. P. 56	24, 27
H.R. Rep. No. 869, 96th Cong., 2d Sess. 71 reprinted in 1980 U.S. Code Cong. & Ad. News 2918	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,[1]
Petitioners,

v.

NAVCO and WILLIAM L. CALDWELL, III,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 3 F.3d 171 and is set forth in Appendix A. The opinion of the United States District Court for the Northern District of Illinois is unreported, but is set forth in Appendix B. The opinion of the district court on motion to alter or amend is

---

[1] The following Central States trustees were parties to the proceeding in the court of appeals and join in this petition: Robert J. Baker, Howard McDougall, Arthur H. Bunte, Jr., R.V. Pulliam, Sr., R. Jerry Cook, and Harold D. Leu. Robert C. Sansone, and Marion M. Winstead, who were plaintiffs below, are no longer Central States trustees.

unreported and is set forth in Appendix C. The order of the court of appeals on petition for rehearing is set forth in Appendix D.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1993. The order denying a petition for rehearing was entered on September 20, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C. § 1301. Definitions.

> (b)(1) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of Section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under Section 414(c) of Title 26.

29 U.S.C. § 1381. Withdrawal liability established; criteria and definitions.

> (a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.
>
> (b) For purposes of subsection (a) of this section—
>
> (1) The withdrawal liability of an employer to a plan is the amount determined under Section

1391 of this title to be the allocable amount of unfunded vested benefits, adjusted—

(A) first, by any de minimis reduction applicable under Section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with Section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under Section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with Section 1405 of this title.

(2) The term "complete withdrawal" means a complete withdrawal described in Section 1383 of this title.

(3) The term "partial withdrawal" means a partial withdrawal described in Section 1385 of this title.

29 U.S.C. § 1399. Notice, collection, etc., of withdrawal liability.

(a) Furnishing of information by employer to plan sponsor.

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete or partial withdrawal by employer.

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

29 U.S.C. § 1451(f). Time limitations.

An action under this section may not be brought after the later of—

(1) six years after the date on which the cause of action arose, or

(2) three years after the earlier date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than six years after the date of discovery of the existence of such cause of action.

Fed. R. Civ. P. 12. Defense and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service or process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other de-

fenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion sh ll be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

Central States, Southeast and Southwest Areas Pension Fund ("Central States" or "Pension Fund") is a multiemployer pension plan within the meaning of Sections 3(2), (35), (37) and 4001(a)(3) of ERISA, 29 U.S.C. §§ 1002(2), (35), (37) and 1301(a)(3). The trustees of Central States are collectively the "plan sponsor" within the meaning of 29 U.S.C. §§ 1002(16)(B) and 1301 (a)(10).

During the fall of 1983, United States Bedding Company ("U.S. Bedding") and The Englander Company ("Englander") filed petitions for bankruptcy protection. Both organizations had contributed to Central States on behalf of their participating employees. Both withdrew from this plan in January 1984, however, and were assessed withdrawal liability of $672,000.00 pursuant to 29 U.S.C. §§ 1381 and 1399(b)(1).[2] Central States filed claims in their respective bankruptcies.

---

[2] This is statutory liability under the Employee Retirement Income Security Act of 1974 ("ERISA") as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") 29 U.S.C. §§ 1381-1451. This Court has recently reviewed the withdrawal liability statute in *Concrete Pipe and Products v. Construc-*

Both U.S. Bedding and Englander were part of a group of trades or businesses under common control (a "controlled group") under the umbrella of Van Vorst Industries, Inc. 29 U.S.C. § 1301(b)(1). Petitioners learned that Van Vorst Industries and other corporate controlled group members had no assets and thus the withdrawal liability was uncollectible against them. But a partnership, NAVCO, whose inclusion in the controlled group was first discovered by Petitioners in 1990, apparently (and in conjunction with its partner William Caldwell) had assets. Petitioners' discovery of NAVCO's controlled group relationship frames much of the legal argument this petition presents.

Because other trades or businesses under common control with U.S. Bedding and Englander were closely held corporations, the affiliation of Respondents with these corporations (*i.e.*, the common control) was not publicly disclosed. Accordingly, Petitioners assigned in-house counsel (located in Chicago, Illinois, where the plan is administered) and retained Los Angeles counsel (where the bankruptcy petitions were filed) to investigate beginning in 1984. As part of the investigation, Central States was confronted with over 650 bankruptcy pleadings and consulted several commercial business directories, but uncovered nothing which disclosed NAVCO's controlled group relationship to U.S. Bedding and Englander.

In addition, on November 3, 1983, Petitioners sent to U.S. Bedding and Englander (and, constructively, to all members of their controlled group, including NAVCO) various inquiries. Formatted in a document called "Statement of Business Affairs," these inquiries requested, in part, the disclosure of all trades or businesses under common control with U.S. Bedding, Englander, or both. NAVCO, and all other controlled group members, were

---

tion Laborers Pension Trust, —— U.S. ——, 113 S.Ct. 2264 (1993). An overview of the statute is also contained in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709 (1984).

required by statute to truthfully respond to the inquiries in writing within thirty days pursuant to 29 U.S.C. § 1399(a). Neither NAVCO nor any other controlled group member responded. A second Statement of Business Affairs, presenting the same inquiries, was sent on March 14, 1984. Again, no response was returned to Petitioners.[3]

It was not until 1990 that Petitioners discovered NAVCO's existence and its controlled group relationship to U.S. Bedding and Englander. The discovery was made by Petitioners' counsel while updating and evaluating withdrawal liability assessment information as part of an ongoing, periodic review program.

This lawsuit followed on May 1, 1991. Petitioners' complaint alleged that NAVCO and, derivatively, William Caldwell (as general partner of NAVCO) are legally responsible for the withdrawal liability assessed against U.S. Bedding and Englander since NAVCO, U.S. Bedding and Englander are controlled group members. It also alleged that the controlled group relationship was concealed since there were no responses to the 29 U.S.C. § 1399(a) inquiries.

Before the district court, the defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the complaint brought against them by Petitioners was time-barred as measured by 29 U.S.C. § 1451(f), which states:

> An action under this section may not be brought after the later of—
>
> (1) six years after the date on which the cause of action arose, or
>
> (2) three years after the earliest date on which the plaintiff acquired or should have acquired

---

[3] *See* district court opinion, Appendix B at 13a-14a (references to the Appendix to this petition will hereafter be abbreviated App. —— at ——).

> actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than six years after the date of discovery of the existence of such cause of action.

The district court agreed with the defendants and granted the motion to dismiss. App. B at 17a; 14a. It reasoned that Petitioners' action accrued on June 5, 1984, when the first withdrawal liability payment was not made, and that the complaint was therefore untimely, measured by the six-year period prescribed in 29 U.S.C. § 1451(f)(1). Because it ruled on a motion to dismiss, the district court received no evidence of whether Petitioners "acquired or should have acquired knowledge of the existence of [the] cause of action" and thus did not consider defendants' concealment and whether diligence had been exercised by Petitioners. In the district court's view diligence was irrelevant to the legal ruling made by the court that a single accrual date applied to each member of the controlled group whether known, unknown, or concealed from the Pension Fund. App. C at 22a.

Petitioners timely appealed to the Seventh Circuit. On appeal, the *NAVCO* court affirmed the district court on the grounds that Petitioners' action accrued "even though [Petitioners] did not know that the injury is actionable." App. A at 5a. Accordingly, the court, like the district court, held that Petitioners' action accrued in 1984, and that, measured by 29 U.S.C. § 1451(f)(1), the complaint was untimely. *Id.* at 9a.

Unlike the district court, and in implicit reversal of it, however, the *NAVCO* court considered equitable doctrines.

> Today's case is not an occasion to determine the limits to equitable extensions under ERISA. . . . [Because] NAVCO and Caldwell did not attempt to deceive the pension funds or induce them to defer suing[,] [the doctrine of equitable estoppel is unavailing]. Equitable tolling, the other doctrine, per-

> mits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim. This doctrine is potentially important in controlled group cases, because sometimes even six years will not be long enough to round up every last member.

Id. at 11a-12a (internal quotation marks and citations omitted).

Finding no record of Central States' diligence in seeking to identify Respondents as potentially liable, the court below concluded that Petitioners had not acted with diligence. To reach this conclusion, however, the court necessarily assumed a factfinder's role because there was no record of Petitioners' lack of diligence, due to the district court's disposition under Fed. R. Civ. P. 12(b)(6). The court below simply ignored the fact that Central States had apprised it of this problem. *See e.g.*, Excerpt of Central States brief on appeal, App. E at 28a-31a, and reply brief App. F at 32a. Indeed at oral argument the following exchange took place:

> *Pension Fund Counsel*: The terms "no showing," in effect lack of diligence, keep cropping up. . . . Well these are factual matters that shouldn't have been resolved on a motion to dismiss. If that is in fact the crux of this, then at a minimum a remand is necessary, and we will show that the Fund did, that we did look at Dun & Bradstreet and—
>
> *Judge Easterbrook*: It is your position that you have evidence that you would present on remand?
>
> *Pension Fund Counsel*: Your honor, we would present evidence of searches that went on, off and on, throughout the six years period.

This exchange, in part, prompted Petitioners to file a motion for rehearing and a suggestion for rehearing in banc, arguing that the claim against NAVCO had been

pursued diligently and that they had been deprived of the opportunity to prove it. Attached to the motion was a twelve-page affidavit of Petitioners' counsel, detailing the numerous steps taken by Petitioners and their counsel to identify NAVCO and its controlled group relationship. On September 20, 1993, the *NAVCO* court denied the motion for rehearing in a five-sentence order that summarily recites that the diligence argument had been waived. The record shows, however, that Petitioners' diligence was not only addressed during oral argument, but that the need for development of such a record was briefed.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION AND SUMMARY

Respondent U.S. Bedding contributed to Central States on behalf of its bargaining unit employees pursuant to a collective bargaining agreement. In January 1984 this obligation to contribute ceased and U.S. Bedding withdrew from Central States within the meaning of 29 U.S.C. § 1381. U.S. Bedding thus became liable for withdrawal liability. Central States demanded payment of the liability from U.S. Bedding on April 6, 1984, but it was not paid. A cause of action arose against U.S. Bedding in 1984 upon its non-payment, but U.S. Bedding had previously filed for bankruptcy. Consequently Central States could not sue the company but, rather, filed a claim in the bankruptcy proceeding.

Under ERISA all trades or businesses under common control with a former (withdrawn) contributor (the "controlled group") are jointly and severally liable for the withdrawal liability. *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 630 F.2d 4, 11 (1st Cir. 1980). A plan's demand received by one member of the controlled group is deemed notice to all members of their collective and

individual obligations to pay. *Central States Pension Fund v. Slotky*, 956 F.2d 1369 (7th Cir. 1992); *IUE AFL-CIO Pension Fund v. Barker & Williamson*, 788 F.2d 118 (3rd Cir. 1986). U.S. Bedding belonged to such a controlled group, and no member of that group paid any liability to Central States. As it is permitted to do under 29 U.S.C. § 1399(a), Central States twice inquired of U.S. Bedding (and thereby the common owners of the controlled group) about the identity of all members of the group. U.S. Bedding and its owners had a statutory obligation to respond to this inquiry but they failed to do so.[4] Central States filed claims against certain bankrupt controlled group members. However, more than six years after U.S. Bedding defaulted on its withdrawal liability obligations, Central States' investigation bore fruit, and Central States learned of the existence of other, non-bankrupt controlled group members, *i.e.*, Respondents in this case, NAVCO and William Caldwell.

Central States was injured in fact, and had knowledge of that injury, when U.S. Bedding failed to pay its withdrawal liability. Central States was also injured in fact when Respondents NAVCO and William Caldwell failed to pay the withdrawal liability. Central States, however, did not initially have knowledge that Respondents had caused any injury to it because Central States had no knowledge of their existence as trades or businesses under common control with U.S. Bedding. That knowledge, under the control of Respondents, was withheld from Central States in disregard of an express statutory obligation to respond to Central States' written inquiry. When Central States eventually acquired that knowledge it filed a lawsuit against Respondents at once. The district court

---

[4] Section 1399(a) requires the employer to "furnish such information as the plan sponsor reasonably determines to be necessary *to enable the plan sponsor to comply with the requirements of this part.*" (Emphasis added.)

dismissed Central States' action under Fed. R. Civ. P. 12(b)(6) on the grounds that the action was barred under the six year statute of limitations found at 29 U.S.C. § 1451(f)(1).

The United States Court of Appeals for the Seventh Circuit affirmed this district court ruling. The court below relied on *United States v. Kubrick*, 444 U.S. 111 (1979), and held that "a claim accrues under a discovery rule for purposes of a statute of limitations when the victim knows of his injury . . . even though the victim does not know that the injury is actionable." App. A at 5a. Accordingly, the court further held, "the fact that the victim does not know who would be the right defendant cannot matter," and therefore concealment cannot matter. *Id.*

Other circuits, also relying on *Kubrick*, have reached a different conclusion. For example, the Second Circuit has held that where there is concealment the identity of a particular entity may be an essential element of a cause of action and thus knowledge of the identity of that entity may be essential before the cause of action accrues:

> Not only was the "what" element of the causation inquiry arguably unknown to plaintiffs, but the "*who*" element was also missing from the puzzle.

Barrett v. United States, 689 F.2d 324, 330 (2d Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983) (holding that lack of knowledge of "who" committed the tort delayed accrual for statute of limitations purposes when concealment was involved). *See also Diminnie v. United States*, 728 F.2d 301 (6th Cir.), *cert. denied*, 469 U.S. 842 (1984).

There is a conflict among the circuits, then, on how *Kubrick* should be applied in determining when a claim accrues under a statute of limitations where the existence of putative defendants is concealed by them, and thus the acts of the defendants giving rise to the injury are un-

known to the plaintiff. The answer to Question 1 of this Petition would resolve this conflict between the circuits.

Further, the interpretation of *Kubrick* taken by the Seventh Circuit in this case is wrong and threatens grave mischief. *Kubrick* simply held that ignorance of plaintiff's *legal rights* does not prevent the accrual of the cause of action. *Kubrick* distinguished such legal ignorance from lack of knowledge of the underlying *facts*. 444 U.S. at 122. In the latter case the court noted that injury in fact may be unknown or unknowable until the injury manifests itself, and the facts about causation may be in the exclusive control of the putative defendant; therefore, lack of knowledge of the underlying facts may delay the accrual of the cause of action for statute of limitations purposes. *Kubrick*, 444 U.S. at 122. Central States was deprived of *factual* knowledge of the common ownership relationship linking Respondents to the withdrawn employer (U.S. Bedding), and therefore was denied knowledge of the *fact* that Respondents had failed to pay their statutory liability. The ruling below strips civil litigants in federal cases of the delayed accrual rule that other circuits believe should apply in the case of a defendant who has concealed his identity or concealed the underlying cause of action. This is particularly anomalous where, as here, Congress specifically directed disclosure. 29 U.S.C. § 1399(a).[5]

This Court should resolve this conflict now. The rights of litigants should not turn on hypertechnical application of rules that are themselves fraught with ambiguity. The fact that the courts of appeals cannot agree on when a cause of action involving concealment is "discovered" under the federal discovery rule puts litigants at risk of *ad hoc* decisionmaking. The federal courts ought to be able to agree about something so fundamental. This prob-

---

[5] Moreover the Seventh Circuit rule punishes honest disclosure and rewards successful concealment by rendering liable only those who have disclosed.

lem is, and will continue to be, particularly acute not only in withdrawal liability controlled group cases, but also in all federal cases involving multiple defendants and issues as to when the plaintiff discovered the role of each defendant in the alleged injury. *Dubose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026, 1031 (5th Cir. 1984), *cert. denied*, 469 U.S. 854 (1984). The cumulative, nationwide impact of the uncertainties created by this split in authority amounts to a manifest injustice. This is not an issue that can await further development; without this Court's guidance the federally created rights of unwitting plaintiffs may be defeated by defendants concealing their involvement in an injury. This Court should clarify when a cause of action accrues in the face of concealment of the very existence and identity of the named defendants.

Of course there are exceptions to statutes of limitations in the form of equitable relief—sometimes referred to as equitable "tolling." A classic case for application of equity to overcome a limitations period is where defendants conceal a material fact and thereby the cause of action. Availability of relief generally turns on whether plaintiffs, through diligent inquiry, should have known of the cause of action.

The court below ruled that equitable relief was not available to Central States due to its lack of diligence in pursuing Respondents. The court, however, erroneously believed that the district court had ruled on a motion for summary judgment, App. A at 3a, and therefore believed that the lack of a showing of diligence was dispositive.[6] In fact in the instant case the district court ruled on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), and did not permit Central States to make a record of dili-

---

[6] The court was confused, perhaps, by a companion case that it had consolidated with the instant case for purposes of decision. *See* App. A at 4a-5a. The other case had been decided on summary judgment, and plaintiffs there had not shown diligence though invited to do so by their district court.

gence. App. B. at 13a. On petition for rehearing Central States pointed out the court's error and that Central States had requested remand for development of such a record in both its brief and at oral argument. Without further explanation (and wholly without basis) the court below ruled that the question had been waived. Question 2 requests that the Court correct this procedural error.

The issues raised by concealment for purposes of the accrual rule are virtually identical to those raised by concealment for purposes of equitable tolling. Indeed the courts of appeals making rulings under *Kubrick* often treat the questions as the same. *See e.g., Diminnie, supra,* 728 F.2d at 305. Had the Seventh Circuit not erred by treating the case as a summary judgment decision, it might under *Kubrick* have reached the right result for a concealment case under the banner of equitable tolling (rather than the banner of delayed accrual). This Court should grant this Petition, reverse the court of appeals on its procedural error, and remand the case for development of a record of Respondents' concealment and Petitioners' diligence in trying to pierce it. It is likely, once that record is made, that the Seventh Circuit would rule differently, thereby removing the conflict in the circuits raised by Question 1.

II. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS ON WHEN A CAUSE OF ACTION ACCRUES UNDER *KUBRICK*.

A. Accrual Of This Withdrawal Liability Action Requires Knowledge Of The Actionable Controlled Group Relationship.

Relying upon *U.S. v. Kubrick*, 444 U.S. 111 (1979), the Seventh Circuit held that a cause of action accrues for purposes of a statute of limitations even though the identity of the defendants is concealed from plaintiffs. *Kubrick*, however, is not so broad. Other courts rely-

ing on *Kubrick* have properly held that the defendants' *concealment* delays the accrual of a cause of action. *Barrett v. United States*, 689 F.2d 324 (2nd Cir. 1982). Thus, there is a direct conflict between the Seventh and Second Circuits on when, under *Kubrick*, a cause of action accrues.

In *Kubrick*, this Court equated knowledge of the plaintiff's "injury and its cause" with "possession of the critical facts that he has been hurt and who has inflicted the injury," at least when the facts about causation are in the control of the putative defendant. *Kubrick* at 122. Nonetheless the *NAVCO* court states that knowledge of "who has inflicted the injury" is irrelevant when fixing an accrual date. In fact, the rationale of this Court's ruling was quite explicit:

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask. If he does ask and if the defendant has failed to live up to minimum standards of medical proficiency, the odds are that a competent doctor will so inform the plaintiff.

Kubrick at 122.[7]

---

[7] It is an inherent problem of withdrawal liability cases that the knowledge of controlled group relationships is in the control of putative defendants and not the Pension Fund. *Barker & Williamson, supra* 788 F.2d at 128; *Central States Pension Fund v. Stotky*, 956 F.2d 1369, 1373 (7th Cir. 1992).

Kubrick's distinction between ignorance of legal rights and ignorance of the underlying *actionable* facts was seemingly lost on the court below, which wrote: "If a claim accrues even though the victim does not know that he has a legal entitlement to recover, the fact that the victim does not know who would be the right defendant cannot matter." *NAVCO*, App. A at 5a. This statement overlooks the practical reality confronting a plaintiff who has claims against multiple parties for the same injury. *Dubose, supra* at 1031. The plaintiff may know at once that he has been injured and even know the identity of one of the parties who caused the injury. However, he may not know the identity of *all* the parties that have caused the injury, and this is not simply due to ignorance of his "legal entitlement" (in the words of *NAVCO*). The plaintiff—like Central States in this case—may have been deprived of basic *factual* knowledge needed to link a particular defendant to the injury.

In *Barrett v. United States, supra*, 689 F.2d 324, the Second Circuit addressed a nearly identical issue. There, a personal representative brought an action pursuant to the FTCA, alleging (1) that the government was negligent in the creation and administration of the Army's chemical warfare program; and (2) that certain parties conspired to cover up the facts of the decedent's death. Reversing the district court's entry of summary judgment in favor of the Army, the Second Circuit found that an issue of fact existed as to whether the government engaged in concealment and whether diligence was exercised by the plaintiff's estate in attempting to identify "*who*" was responsible for the untimely death of the decedent. *Barrett*, 689 F.2d at 330 (emphasis added). The court explained that "[t]his case presents an instance in which *knowledge of the identify of the tortfeasor* is a critical element to the accrual of a claim." *Barrett* at 330 (emphasis added). The court observed that, since the Army may have concealed the tortfeasor's identity, the cause of action may not have "accrued" until the Secretary of the Army re-

vealed that the decedent died from the injection of a mescaline derivative administered to him while he unknowingly served as a test subject in an Army chemical warfare experiment. *Barrett* at 330.

The *NAVCO* court's decision also conflicts with the Sixth Circuit's decision in *Diminnie v. United States*, 728 F.2d 301 (6th Cir.), *cert. denied*, 469 U.S. 842 (1984). There, the court considered an action brought under the FTCA, "asserting a wide variety of claims arising from Diminnie's arrest, trial and conviction." *Diminnie* at 302. Reviewing *Barrett*, the Sixth Circuit ruled that the *accrual* of a cause of action under the FTCA may be deferred "because of the plaintiff's *inability to identify the party whose conduct triggered the injury*," if that party played a wrongful role in concealing his identity. 728 F.2d at 305 (emphasis added).[8] Compare, *Harrison v. United States*, 708 F.2d 1023, 1028 (5th Cir. 1983), stating in dicta that, because of the defendant's concealment, the law imposes "a heavier burden in showing that the plaintiff possessed the level of knowledge required to commence accrual of the period of limitations."[9]

Barrett, *Diminnie*, and *Harrison* accord with *Northern California Retail Clerks Pension Fund v. Jumbo Markets, Inc.*, 906 F.2d 1371 (9th Cir. 1990), an action brought by an ERISA fund to collect pension contributions. There, the Ninth Circuit held that, when an employer fails to report the amount of contributions owed to the penison fund, the statute of limitations for an action to collect unpaid contributions does not "accrue" until the pension fund has "reason to know" of the alleged underpayment. This is analytically the same as the present case. In this case Petitioners could not know of Respondents'

---

[8] *See also Fitzgerald v. Seamans*, 553 F.2d 220, 229 (D.C. Cir. 1977).

[9] In appropriate concealment cases diligence of plaintiff may not be required at all. *Baskin v. Hawley*, 807 F.2d 1120 (2nd Cir. 1986).

failure to pay at least until they knew of the existence of Respondents and their controlled group relationship with U.S. Bedding and Englander. Further, Respondents had a duty to inform Petitioners of their identity as a member of the statutory controlled group and they failed to comply with that duty.

Barrett, Diminnie, Harrison, and *Jumbo Markets* all stand for the proposition that concealment by the defendant of the identity of one of the perpetrators of an injury will delay the "accural" date of a federal cause of action.[10] The *NAVCO* court's decision stands in marked contrast. Because this issue potentially applies to the accrual of any federal cause of action, it is imperative that a uniform standard be adopted for use throughout the country. For this reason, among others, Petitioners submit that a writ of certiorari should issue.

B. Certiorari Is Warranted Here Because The Seventh Circuit's Decision Undermines Significant ERISA Policies.

1. The conflict with *Sandoz Masonry's* policy discussion.

Apart from the conflict noted above, the Seventh Circuit's decision ought to be reviewed by this Court because it fails to account for, and thus frustrates, the policies underlying ERISA.

This Court in *Kubrick* established a flexible standard, designed to recognize and accommodate the legislative policies and purposes underlying a statute, and the difficulties inherent in prosecuting a statutory action. *Dubose v. Kansas City S. Ry. Co.*, 729 F.2d 1026 (5th Cir.), *cert. denied*, 469 U.S. 854 (1984). The *NAVCO* court's

---

[10] This is also consistent with *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 234 (1959), where this Court stated that, with respect to the statute of limitations, no man can take advantage of his own wrong.

decision, however, fails to consider these factors. It focuses, instead, upon a perceived need to ensure prompt action to collect withdrawal liability assessments. The court wrote: "Congress told the trustees of pension funds *not to tarry* in assessing and collecting liability. The fund shall compute liability and demand payment '[a]s soon as practicable after an employer's complete or partial withdrawal.' 29 U.S.C. § 1399(b)(1)." App. A at 9a (emphasis in original).[11]

While it is true, as the court states, that statutes of limitations serve vital social interests, these social interests—"the usual ones of preventing stale claims that may be hard to prove, and protecting the interest of potential defendants in knowing their liabilities," App. A at 8a —must be weighed against the social interests expressed in the main, substantive body of the legislation. This view is well expressed by the D.C. Circuit in *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1125-27 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989), the only other appellate decision which addresses the statute of limitations for collection of withdrawal liability.

In *Sandoz Masonry*, the defendant interposed a statute of limitations defense. Revisiting the general interests served by limitations provisions, and weighing them with the interests inherent to the collection of withdrawal liability, the D.C. Circuit stated:

---

[11] The Seventh Circuit's reliance upon 29 U.S.C. § 1399(b)(1) for the view that pension plans must not delay in filing suit against controlled group members is entirely misplaced, since that provision relates solely to the time period existing between the date of withdrawal and the service of the notice and demand for payment. It does not relate to the time for bringing suit, after default on the notice and demand, as that period is covered by the applicable statute of limitations. Here Central States did comply with § 1399(b)(1) by issuing its assessment and filing claims immediately against all known members of the U.S. Bedding group of trades or businesses.

> Sandoz's reading of the purposes and policies animating the MPPAA is curiously one-dimensional. To be sure, Congress has indicated that promptly collecting outstanding sums is desirable. That indication, however, is one aspect of the Act's more general purpose of ensuring that plans collect the amounts due from employers, a purpose subsidiary to the Act's overriding purpose of ensuring that plans remain solvent despite employer withdrawals (and thus able to provide pension payments to workers who have earned them). The employer's reading of the statute would elevate one narrow statutory policy (favoring prompt collection) over the more general goal (collection) and overriding purpose (solvency) which animate and generate that narrow preference. There is no indication that the Act requires, as Sandoz would have it, either prompt collection or no collection at all. Rather, the Act requires that the plan sponsor act "as soon as practicable after an employer's complete . . . withdrawal." 29 U.S.C. § 1399(b)(1).

871 F.2d at 1126.

Because the *NAVCO* decision plainly disregards the policies animating the D.C. Circuit's decision in *Sandoz Masonry* [12] and subjects Petitioners to a completely different approach to the collection of withdrawal liability, this Court's intervention is needed. This Court should grant the petition in order to eliminate the conflict in appellate

---

[12] These policies are echoed in *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3rd Cir. 1986), where the court stated:

> The MPPAA was designed "(1) to protect the interests of participants and beneficiaries in financially distressed multiemployer plans, and (2) . . . to ensure benefit security to plan participants." H.R. Rep. No. 869, 96th Cong., 2d Sess. 71 reprinted in 1980 U.S. Cong. & Ad. News 2918, 2939.
>
> * * * *
>
> Courts have indicated that because ERISA (and the MPPAA) are remedial statutes, they should be liberally construed in favor of protecting the participants in employee benefit plans.

approaches to the enforcement of ERISA, by fixing a uniform accrual date.

2. The *NAVCO* court made 29 U.S.C. § 1451(f)(2) superfluous.

Congress enacted MPPAA to protect the interests of participants and beneficiaries of multiemployer plans by ensuring that these plans would be financially stable. 29 U.S.C. § 1001a. The *NAVCO* decision, however, does just the opposite and, as a result, must be corrected by this Court.

As part of its overall remedial scheme, Congress included comprehensive limitations provisions, found at 29 U.S.C. § 1451(f)(1) and (2). Section 1451(f)(2), as an alternative to § 1451(f)(1), expressly applies to actions involving concealment. The decision below, however, strips § 1451(f)(2) of all operative effect in withdrawal liability actions since pension funds will always know, in practice, when the contributing member of a controlled group fails to make payment. Thus, because the Court held that this fact—non-payment by one entity—triggers the accrual of withdrawal liability claims against each member of the group under § 1451(f)(1), even claims against non-contributing, unknown group members, it renders § 1451(f)(2) superfluous. Indeed the *NAVCO* court's analysis turns § 1451(f)(2) on its head by suggesting its purpose is to cap the statute at six years rather than to extend the statute by up to six years in the case of concealment. App. A at 11a.

Read together with 29 U.S.C. §§ 1399(a) and 1104 (a)(1)(A)(ii), a role for 29 U.S.C. § 1451(f)(2) clearly emerges. The cornerstone of the analysis is 29 U.S.C. § 1399(a) which provides:

> An employer *shall*, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be

> necessary to enable the plan sponsor to comply with the requirements of this part. [Emphasis added.]

A timely and truthful § 1399(a) response from the employer helps defray administrative expenses, as required by 29 U.S.C. § 1104(a)(1)(A)(ii), by establishing the direction and scope of a plan's controlled group investigation. A timely and truthful § 1399(a) response assures immediate accrual of a cause of action from the date of non-payment for purposes of the six-year limitations period under 29 U.S.C. § 1451(f)(1). Unanswered § 1399(a) inquiries or untruthful responses trigger § 1451 (f)(2)'s limitations provision. Employers who do not answer § 1399(a) inquiries, or answer them untruthfully are guilty of "fraud or concealment" and the cause of action against them does not accrue immediately. *See Smith v. Nixon*, 606 F.2d 1183 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (disregard of a statutory duty to disclose tolls the statute of limitations).

This position has much to recommend it: symmetry and certainty are promoted (to say nothing of its faithfulness to principles of statutory construction); moreover, a remedy is imposed against uncooperative and deceitful employers, while repose is given to honest employers.

The Seventh Circuit's decision, however, confers immunity to employers who fail to obey the affirmative command of 29 U.S.C. § 1399(a). This is wrong in view of the remedial goals Congress intended for MPPAA. The question then becomes, "What sanction is appropriate?" For the reasons already discussed, 29 U.S.C. § 1451(f)(2) imposes the most logical sanction—it delays the accrual of a withdrawal liability action and, thus, denies uncooperative and deceitful employers the repose they would otherwise enjoy.

The Seventh Circuit's view thus weakens ERISA, while the position Petitioners advocate supports ERISA purposes in a manner consistent with its language, by (i)

imposing a sanction for 29 U.S.C. § 1399(a) violations and, in the process, (ii) reserving a role for 29 U.S.C. § 1451(f)(2).

In sum § 1451(f)(2) may be viewed as a codification of the two-pronged *Kubrick* standard of knowledge of the injury and its cause. The Seventh Circuit's disregard of this provision, and the ERISA policies it advances, has led it to this conflict with *Kubrick* and *Barrett*. This Court should grant the Petition to resolve the conflict.

III. THE COURT BELOW EMPLOYED THE WRONG STANDARD OF REVIEW: IT HELD PETITIONERS ACCOUNTABLE FOR FAILING TO MAKE A RECORD OF DILIGENCE FOR SUMMARY JUDGMENT WHEN IN FACT THE DISTRICT COURT RULED WITHOUT A RECORD ON RESPONDENTS' MOTION TO DISMISS.

The defendants (Respondents herein) filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), which the district court granted. On appeal, however, the court below erroneously believed that the procedural basis of defendants' motion was summary judgment under Fed. R. Civ. P. 56. The court then looked for a record of diligence by Petitioners that might support equitable relief, but it found none. For example, the court found that Petitioners had not explained how the action against the defendants was discovered. The court also found that Petitioners were not diligent in pursuit of the defendants. *NAVCO*, App. A at 3a, 12a. On petition for rehearing, Petitioners presented the court below with a twelve page affidavit which outlined the numerous steps they took to identify the defendants subsequent to their 1983 withdrawal (including the very steps the court thought to be indicative of diligence). Since the district court dismissal had foreclosed the opportunity to make such a record, Petitioners sought a remand for that purpose. The court below stated, however, that Petitioners had waived the right to present this factual argument since it had not

been previously presented to the court. *See* Order Denying Petition for Rehearing With Suggestion for Rehearing In Banc, dated September 20, 1993. Appendix D at 27a. In this regard, the court simply erred, both factually and legally, causing serious injury to the interests served by ERISA.

With respect to the court's factual error, this Court need look no further than the transcript of the oral argument on Petitioners' appeal. There, Petitioners advised that, on remand to the district court, they would show their diligence in pursuing their claim. Diligence was also raised in Petitioners' appellate briefs.[13] The briefs argued that Petitioners were eligible for equitable relief; that a dismissal under Rule 12(b)(6) was therefore improper; and that Petitioners were entitled to make a record (on remand) to support their equitable claims. The diligence argument was thus implicit in Petitioner's request for remand to make a record.

The court's legal error—its failure to allow Petitioners the opportunity to present evidence on the question of diligence—is important in its impact on the orderly process of withdrawal liability claims. A Fed. R. Civ. P. 12(b)(6) motion does not test the truth of facts alleged in a complaint. Instead, dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). These same principles constrained the D.C. Circuit in *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981). There, in denying the defendants' statute of limitations motion, the court stated:

> There is an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations

---

[13] An excerpt of this section of Petitioners' brief on appeal is included at App. E at 28a-31a. An excerpt of the reply brief is included at App. F at 32a.

> defense. Although it is true that a complaint sometimes discloses such defects on its face, it is more likely that the plaintiff can raise factual setoffs to such an affirmative defense.
>
> * * * *
>
> We do not hold that the use of a motion to dismiss is always improper to raise a statute of limitations defense, but we do suggest that a responding party often imposes an undue burden on the trial court and impedes the orderly administration of the lawsuit when he relies on a motion to dismiss to raise such an affirmative defense. On remand, and upon filing an appropriate responsive pleading, the appellees will be free to present whatever evidence they have to Richards' dilatory behavior, if any. In the current posture of the case, however, it was error to dismiss the action on the basis of an affirmative defense without any responsive pleading from the defendants.

Richards, 662 F.2d at 73.[14]

Likewise, in *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336 (D.C. Cir. 1991), a case involving an assertion by the employer that the pension fund's claim for contributions was barred by the statute of limitations, the United States Court of Appeals for the District of Columbia Circuit ruled that the question of whether the pension fund used due diligence in determining whether additional contributions were due could not be resolved by a summary judgment motion. *See also Robertson v. Seidman & Seidman*, 609 F.2d 583 (2nd Cir. 1979); *Williams v. Hartje*, 827 F.2d 1203 (8th Cir. 1987).

The *NAVCO* court was presented with a decision by the district court that was based upon Fed. R. Civ. P.

---

[14] The Court noted in footnote 6, "We do no more than add to an overwhelming line of authority. *See e.g., Glus v. Eastern Brooklyn Terminal*, 359 U.S. 231, 235, 79 S.Ct. 760, 763, 3 L.Ed.2d 770 (1959) (question of plaintiff's diligence "cannot be decided at this state of the proceedings," on a motion to dismiss) . . . ."

12(b)(6), not Rule 56 as the court incorrectly noted. Moreover, the court's opinion contains factual findings regarding Petitioners' diligence, although the district court made no such findings and did not consider the matter. When this fact was brought to the court's attention in a motion for rehearing, the court stated that Petitioners had waived their right to make such an argument, despite the fact that the court had been advised in briefs and at oral argument that equitable doctrines were applicable, and that Petitioners would present facts, if given an opportunity to do so, establishing their diligence.

The summary action taken by the court runs contrary to the firmly settled judicial preference for deciding cases on "the basis of substantive rights rather than technicalities, [with Petitioners to] receive every reasonable opportunity to cure formal defects in their pleadings." *Richards, supra.* This is especially critical, given the nature of Petitioners' claim, that is, a claim for the collection of withdrawal liability under ERISA. The overriding purpose behind the enactment of MPPAA was to insure the financial solvency of pension plans. *Joyce v. Clyde Sandoz Masonry*, 871 F.2d at 1125-27. Like the defendants in *Sandoz Masonry*, the court below seems to favor a policy that is "curiously one-dimensional". *Id.* at 1126.

At a minimum, the court below should have given Petitioners the opportunity to present evidence of diligence in support of the equitable relief they sought. It failed to do so, however, and it is left to this Court to correct the appellate court's palpable error. Clearly, the action taken by the court has tilted the congressional balance in the wrong direction, permitting the defendants to take advantage of their own wrong.

CONCLUSION

The decision below conflicts with the decisions of the other courts of appeals, with the decision of this Court, and with the policies of ERISA. This Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

RUSSELL N. LUPLOW
DAVID SAWYER
DAVID MACHNACKI
LAW OFFICES OF
RUSSELL N. LUPLOW
33 Bloomfield Hills Parkway
Suite 145
Bloomfield Hills, MI 48304

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
JAMES P. CONDON
9377 West Higgins Road
Rosemont, IL 60018-4938
(708) 518-9800
Attorneys for Petitioners Central States, Southeast and Southwest Areas Pension Fund, et al.

* Counsel of Record